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IN THE

Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-1916

CLARENCE TONKA, *Petitioner*,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, American Telephone and Telegraph Company, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the summary affirmance by per curiam opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

In addition to the opinions identified by petitioner and set forth in the appendices to his petition, respondent respectfully refers the Court to the unre-

ported Order of the United States District Court for the Northern District of Georgia entered on April 14, 1978, which contains the district court's findings of fact and conclusions of law, and which appears at p. 1a, *infra*.

STATEMENT OF THE CASE

In December of 1974, petitioner, Clarence Tonka, filed an action pursuant to the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, *et seq.*, against respondent, alleging that he had been discriminated against in the terms of his employment on account of his age. Neither petitioner nor respondent requested a trial by jury within ten days of the filing of the complaint and answer.

On March 2, 1978, over three years after the time for filing a jury demand had expired, petitioner filed a demand for jury trial pursuant to Rule 38(a) of the Federal Rules of Civil Procedure and a motion for jury trial pursuant to Rule 39(b) of the Federal Rules of Civil Procedure. By that time, all discovery had been completed; a non-jury pretrial order had been prepared by the parties and approved by the court at a pretrial conference; the case had twice been placed on a non-jury trial calendar and twice been continued; and the case was then scheduled to be tried by the court two weeks thereafter. Nonetheless, petitioner argued that his jury demand was timely because filed within ten days of this Court's decision in *Lorillard v. Pons*, 434 U.S. 575 (Feb. 22, 1978).

The district court entered an order on March 8, 1978 denying petitioner's motion and jury demand. The court stated that this Court's decision in *Pons* did not create a new right that petitioner never had

previously, but simply put to final rest the split of authority among the circuits and among district court judges. The court further noted that petitioner had waited three years to demand a jury trial, although a number of district and circuit court decisions had proclaimed that a right to jury trial did exist in favor of private litigants in ADEA actions.¹ The court cited the obvious inconvenience to respondent and to the court in transferring the case, already set on a non-jury calendar, to a jury calendar. In addition, the court noted that the case had the potential of being complicated and complex, that memories fade, and that it would be inconvenient to recall witnesses for a trial at some unknown subsequent date.

The case was thus tried to the court without a jury on March 13-17 and 20, 1978. Petitioner was the only witness testifying on his behalf. At the close of petitioner's case, the court granted respondent's motion to dismiss certain of the allegations pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Respondent then presented seven lay witnesses and one expert witness to rebut the remaining allegations of age discrimination.

On April 14, 1978, the district court entered an order, findings of fact, conclusions of law, and judgment in favor of respondent and against petitioner. See p. 1a, *infra*. The district court concluded that respondent had

¹ An ADEA case had been tried to a jury in the Atlanta Division of the Northern District of Georgia, the district court below, as early as 1971. *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231 (N.D. Ga. 1971). In *Chilton v. National Cash Register Corp.*, 370 F. Supp. 660 (S.D. Ohio, Feb. 1, 1974) the court expressly recognized a right to jury trial in ADEA actions ten months prior to the filing of petitioner's complaint.

not discriminated against petitioner with respect to his compensation, terms, conditions, or privileges of employment, or in any other manner, on account of age, within the meaning of the ADEA. See p. 9a, *infra*.

In his Statement of the Case, petitioner has recited the factual contentions which he presented to the district court as if such contentions were the facts of this case. The district court, however, rejected those contentions in its findings of fact. See p. 1a, *infra*. For example, rejecting petitioner's three principal allegations, the district court found that petitioner's age was not a factor with respect to respondent's evaluation of his job level, with respect to respondent's determination of when he could use a company car, or with respect to respondent's determination of his salary. See p. 8a, *infra*.

On appeal to the United States Court of Appeals for the Fifth Circuit, petitioner challenged the district court's order of March 8, 1978, denying his jury demand and motion for jury trial. Petitioner did not challenge any other action of the district court; nor did he contend that the court's findings of fact were clearly erroneous. In its per curiam opinion, the Fifth Circuit agreed with the district court's denial of the motion and demand for jury trial for the reasons stated in the district court's order of March 8, 1978.

REASONS WHY THE WRIT SHOULD BE DENIED

I. This Court's Decision In *Lorillard v. Pons* Did Not Nullify Petitioner's Prior Waiver Of Trial By Jury

Rule 38(b) of the Federal Rules of Civil Procedure provides that the right to trial by jury can be preserved by serving a written demand upon opposing parties

within ten days after the service of the last pleading directed to the issues for which jury trial is sought. Rule 38(d) provides that "the failure of a party to serve a demand as required by this Rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. . . ."

Attempting to circumvent the requirements of Rule 38, petitioner argued to the district court and the Fifth Circuit that until this Court rendered its decision in *Lorillard v. Pons*, 434 U.S. 575 (1978), on February 22, 1978, he had no clear right to a jury trial which he could have waived. He contended that his demand for jury trial, filed within ten days of that decision, was timely under Rule 38.

The crux of petitioner's argument to the court below was the proposition that "any right to trial by jury must reasonably be known and established by existing law before there can be a known waiver of any such right." Petitioner, however, cited no support for that proposition, as there is none.

Courts have uniformly held that pursuant to Rule 38, jury trials may be waived inadvertently, without an intentional waiver of a known right. An express waiver is not required; inaction by counsel will suffice. As stated by Professors Wright and Miller:

... it is clear that the test of waiver that is applied to other constitutional rights, that there must have been 'an intentional relinquishment or abandonment of a known right or privilege,' is not applicable to the right to trial by jury.

Wright and Miller, *Federal Practice and Procedure*, Civil § 3231, at p. 101. See, e.g. *Moore v. United States*, 196 F.2d 906 (5th Cir. 1952) (rejecting defendants'

argument "that they could not waive a right [to jury trial] they did not have." 196 F.2d at 909). Thus, the cases cited by petitioner for the proposition that "unvested constitutional rights cannot be waived" are not applicable to a waiver of jury trial pursuant to Rule 38 of the Federal Rules of Civil Procedure. In any event, petitioner concedes (at page 13 of his Petition) that this Court in *Pons* did not reach the question of whether there is a constitutional right to jury trial in ADEA cases but rather determined that the right stems from the statute. *Lorillard v. Pons*, 434 U.S. 575, 577 (1978).

II. The Decision Below Does Not Conflict With This Court's Decision In *Lorillard v. Pons*.

The only reason suggested by petitioner as warranting review of the proposed issue is that the Fifth Circuit's summary affirmance of the district court's order conflicts with this Court's interpretation of the ADEA in *Pons*. Contrary to that suggestion, however, this Court in *Pons* gave no consideration to the issue of jury trial waiver. In its opinion, this Court noted that plaintiff, Frances P. Pons, "demanded a jury trial on all issues of fact; petitioner moved to strike the demand." 434 U.S. at 576. Thus, Frances P. Pons preserved her right to jury trial by making a timely demand therefor; petitioner in this case did not.

Nor is the decision below in conflict with any other decision, either of this Court or any other court. Petitioner's proposition that automatic waiver of a right to jury trial pursuant to Rule 38(d) can somehow be undone by subsequent events has no judicial support. As noted above, the cases cited by petitioner relating to the standard for waiving an unvested constitutional

right are not applicable to the waiver of jury trials pursuant to Rule 38(d).

Nor does petitioner suggest any other special or important reason warranting review of the decision below. Petitioner has cited no cases pending in lower courts which would turn on the resolution of the proposed issue. Nor is the proposed issue likely to recur; *Lorillard v. Pons* established a clear, unambiguous right to jury trial, and Congress has confirmed that decision by legislative amendment. Thus, a resolution of the proposed issue by this Court would affect but two parties: petitioner and respondent. The case is thus inappropriate for the granting of certiorari review.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION No. 74-2336A

CLARENCE TONKA

vs.

AMERICAN TELEPHONE & TELEGRAPH COMPANY

Order

Filed April 14, 1978

This case was tried to the Court without a jury on March 13, 14, 15, 16, 17 and 20, 1978, pursuant to an action brought by the plaintiff Clarence Tonka against American Telephone & Telegraph Company, under § 7(b) and (c) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 627(b) and (c), and § 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b). Based upon the evidence and argument of counsel, trial briefs and memoranda submitted before, during and after the trial, the Court makes the following Findings of Fact and Conclusions of Law and orders Judgment accordingly.

Findings of Fact

1.

Plaintiff, Clarence Tonka, was born December 9, 1922. He has been continuously employed by defendant, American Telephone & Telegraph Company, Long Lines Department since 1948.

2a

2.

Pursuant to defendant's Management Job Evaluation system ("MJE"), management positions are rated at various numbered levels which determine salary ranges. A lower number job level has a higher salary range than a higher number job level. First level management jobs are rated at levels 14, 13, and 12, and second level jobs are rated at levels 10, 9, and 7. The salary range of a level 9 job is higher than that of a level 12 job. Job performance is not relevant to the rating level of a job pursuant to MJE. Job performance is relevant to the determination of an employee's salary within the salary range of his job level.

3.

In February of 1966, when plaintiff was 43 years old, he was promoted from a non-management position to a level 12 management position. Since that time he has been a "staff accountant" in defendant's Southern Area office in Atlanta, Georgia and has received salary treatment in accordance with his 12 level job rating.

4.

Between January 1, 1971 and September 1, 1977, plaintiff's primary job responsibility was to provide accounting support to National Account Management ("NAM") teams for the national accounts headquartered in the defendant's Southern Area. A NAM team is headed by a national account manager from the defendant's sales department, who is responsible for servicing the particular national account. A national account is a large user of telephone services designated by the defendant to receive the services of a NAM team. In addition to the national account manager, a NAM team is composed of employees from departments other than sales who provide special expertise in serving the national account.

3a

5.

By memorandum dated December 28, 1973, plaintiff received certain responsibilities in addition to his NAM accounting function: (1) accounting department safety representative, (2) office rearrangements, (3) records management, including coordination of micro-film and micro-fiche, and (4) audits of certain cashiers. Plaintiff had previously assisted in the performance of some of this work in connection with each of these additional responsibilities, with the exception of micro-film and micro-fiche. These additional duties were assigned to plaintiff in response to his assertions that he was "on top of" his NAM accounting work and was therefore ready to assume additional responsibilities. Apparently, plaintiff actually sought these additional duties in the belief that such would enhance his chances for an upgrade in job level and based upon a conversation he had with a former supervisor, E. W. Scott, in July or August of 1972, at which time Scott advised the plaintiff that his best hope for a "promotion" would be to get his job "expanded."

6.

Even after the assignment of the additional duties, the NAM accounting function was plaintiff's primary job responsibility. While plaintiff testified that much of these additional duties were taken away from him after he filed his age discrimination charge with the Department of Labor, he conceded that even with the additional duties his primary job responsibility was the NAM accounting function which would consume the great majority of his time.

7.

Upon receiving the additional assignments, plaintiff complained to the defendant that his job should be rated at the higher 9 level. By letter dated April 23, 1974, he notified the Secretary of Labor of his intent to file suit under the Age Discrimination in Employment Act. He stated the date of discrimination to be December 28, 1973.

4a

8.

In December of 1973, plaintiff was responsible for three national accounts headquartered in the Southern Area. Occasionally, when requested and sometimes voluntarily, he provided assistance to other customers of defendant. None of the three national accounts had common control switching arrangements. (Hereinafter, national accounts having common control switching arrangements will be referred to as "CCSA accounts.") Plaintiff had no subordinates reporting to him.

9.

CCSA accounts utilize combined bills, which are not available to non-CCSA accounts. In addition, CCSA accounts are provided automatic message accounting ("AMA") sample data, which is also not provided to non-CCSA accounts. CCSA accounts are particularly difficult and complex accounts with respect to the provision of NAM accounting support.

10.

Plaintiff claimed that he was performing the same NAM accounting function as 9 level employees situated in the defendant's Western Area (Mr. Miller), Central Area (Mr. Taggart), Northeastern Area (Ms. MacDonald), Eastern Area (Ms. Chatfield), and Midwestern Area (Mr. Lowe), or, alternatively, that his job responsibilities were equivalent to those of the 9 level employees. The court finds, however, that there were substantial and significant differences between the jobs of these 9 level employees and that of the plaintiff, and that the duties and responsibilities of the 9 level employees were much more than those of plaintiff (See defendant's Summary Exhibits 68 and 69). Ms. MacDonald, Mr. Lowe, and Mr. Miller each delegated the NAM accounting function to 12 level subordinates. Ms. MacDonald, in addition to supervising three 12 level employees involved in the NAM accounting func-

5a

tion, was responsible for a private line billing group. She supervised five level 13 employees and forty-five clerks. Mr. Miller's involvement with NAM accounting problems was minimal. He was responsible for the integrity of all Western Area accounts, and he supervised two 12 level employees and one clerk. Mr. Lowe had a broad range of responsibilities in addition to the NAM accounting function; he supervised twenty employees. Ms. Chatfield and Mr. Taggart did not delegate their NAM accounting responsibilities to level 12 employees, but each handled substantially more national accounts and the accounts each handled were substantially different and more complex than those handled by plaintiff. Ms. Chatfield was in charge of a private line billing group; she supervised three management employees and one clerk. She was responsible for thirteen national accounts, four of which were CCSA accounts. Mr. Taggart was responsible for twelve national accounts, four of which were CCSA accounts. He was also responsible for three national accounts which utilized "summary billing." None of the plaintiff's three national accounts were ever CCSA accounts, and none of plaintiff's three national accounts used summary billing during 1973-1977.

11.

The court finds much similarity between plaintiff's job and the jobs of other 12 level employees having NAM accounting responsibilities. The 12 level NAM accountants in the Northeastern Area (Ms. Cunningham, Ms. Vaughan, and Mr. DeSorbo), Western Area (Mr. Smith), and Midwestern Area (Ms. Rawie) had NAM accounting responsibilities substantially similar to those of the plaintiff, with the exception that each of these other 12 level employees had more national accounts than the plaintiff and, unlike plaintiff, had CCSA accounts. Mr. Smith and Ms. Rawie, like plaintiff, had certain other responsibilities in addition to their NAM accounting functions.

12.

As a result of plaintiff's complaint about the level of his job, plaintiff was asked to write a job description to be evaluated pursuant to defendant's MJE. When plaintiff refused to write such a job description, Mr. Frank Sullivan, his supervisor, prepared one for him dated March 18, 1974. Although plaintiff did not concur with the accuracy of that job description, he refused to indicate what changes or additions would make it accurate.

13.

The court finds that contrary to plaintiff's assertion, there is no substantial or material deviation between the job description prepared by Mr. Sullivan and paragraph 8 of the job description of Mr. William Scott, with respect to the description of the NAM accounting function. (Mr. Scott had previously had NAM accounting responsibility in the Southern Area, in addition to a broad range of other responsibilities.) There is virtually no substantive difference between plaintiff's job description and the December 28, 1973 memorandum with respect to the description of the four additional duties assigned to the plaintiff.

14.

There is no substantial deviation between the October 1969 model job description for the NAM accounting function rated at level 12 (defendant's Exhibit 70) and that of the plaintiff's job description or the job descriptions of the other level 12 employees, with respect to the description of the NAM accounting function. According to Millard Brown, defendant's Personnel Manager in charge of Management Job Evaluation with extensive training and experience in job evaluation, jobs are evaluated on an objective basis as to the value of the particular job to the company and as compared in the market place. A valid job evaluation does not consider the performance of the

employee holding the job. Brown testified that the assignment, on December 28, 1973, of additional duties to plaintiff's NAM responsibilities made no appreciable difference in the value of the job to the company and that the addition of such duties would not change plaintiff's job to a grade level higher than 12.

15.

Cranked into the job evaluation process, in addition to the quantity and resulting responsibility that ensues, is the complexity of the job. Chatfield (Eastern Area) and Taggart (Central Area), with considerably more national accounts, CCSA and summary billings, accounting instructions and some subordinate responsibilities, held jobs more valuable to defendant than the job held by plaintiff even taking into consideration plaintiff's additional responsibilities assigned December 28, 1973, apparently at his own request, and which had previously been performed at levels 12 or lower.

16.

Plaintiff's job was properly matched with the 12 level NAM accounting jobs in the Northeastern Area pursuant to defendant's MJE and was properly evaluated at level 12. In reaching this finding, the court has not considered the 1976 job description prepared by a subsequent supervisor, Mr. Harold Hairston.

17.

Based upon the above factors, the court finds that plaintiff's job was evaluated at level 12 for valid reasons completely independent of plaintiff's age.

18.

Plaintiff's testimony regarding alleged conversations with supervisors Scott and Sullivan with respect to his age was at best equivocal and was denied by them. There

is no evidence of any admission or statement by Mr. Crabb concerning age—only an equivocal comment alleged to have been made to him by plaintiff and unanswered by Crabb.

19.

With respect to the allegation that plaintiff was denied the use of a company car on account of his age, the court finds that there was no such company policy restricting plaintiff's use of a company car, that plaintiff made unwarranted assumptions that his age somehow barred his use of a company car, that plaintiff never sought clarification of the company policy with respect to his use of the company car, that plaintiff never complained about his perceived inability to use a company car, and that the company in fact never denied plaintiff the use of a car on account of his age.

20.

Based upon all evidence in the record, plaintiff's age was not a factor with respect to defendant's evaluation of his job at the 12 level, with respect to defendant's determination of when plaintiff could use a company car, or with respect to defendant's determination of plaintiff's salary.

Conclusions of Law

1.

The Court has subject matter jurisdiction of this action pursuant to Section 7(b) and (c) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 627(b) and (c) (the "ADEA"), and § 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b).

2.

Plaintiff has been a member of the protected class within the meaning of the ADEA at all times material to the issues of this case.

3.

Defendant has not discriminated against the plaintiff with respect to his compensation, terms, conditions, or privileges of employment, or in any other manner, on account of his age, within the meaning of the ADEA.

Accordingly, the Clerk is hereby ORDERED to enter Judgment in favor of defendant American Telephone & Telegraph Company, each side to bear its own costs.

It Is So ORDERED.

This, the 14th day of April, 1978.

/s/ RICHARD C. FREEMAN
Richard C. Freeman

United States District Judge